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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH UTILITIES, INC., AND LOUISIANA POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 134) is reported at 235 F. 2d 167. The findings and opinion of the Securities and Exchange Commission dated September 13, 1955 (R. 129), are unreported, as are the findings and opinion of the Commission dated March 20, 1953 (R. 103).

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (R. 143). The petition for a writ of certiorari was filed on September 28, 1956, and

was granted on December 3, 1956 (R. 144). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. (a). Whether Section 11 (b) of the Public Utility Holding Company Act of 1935—which authorizes the Securities and Exchange Commission, upon a showing that "the conditions upon which the order was predicated do not exist," to revoke or modify any final order previously entered under Section 11 (b)—relates to a situation where there has been no change in conditions since the entry of the original order.

(b). If so, whether legal determinations made in connection with the original order become reviewable on review of a Commission order denying a petition to reopen the former proceeding.

2. (a). Whether Section 11 (b) (1) (A)—which makes the "loss of substantial economies" a prerequisite to retention by a registered holding company of "additional systems"—relates to the loss to be incurred by the principal system as well as by the "additional systems" sought to be retained.

(b). Whether the required "loss of substantial economies" must cause such a serious economic impairment to the systems involved as to render them incapable of independent economic operation.

STATUTE INVOLVED

Sections 11 (b) (1) and 24 (a) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 820, 834, 15 U. S. C. 79k (b) and 79x (a), are set forth in the Appendix, *infra,* pp. 49–51.

STATEMENT

This Court has previously had occasion to consider questions under the Public Utility Holding Company Act of 1935 ("the Act") relating to holding company systems of which the respondent, Louisiana Power & Light Company ("Louisiana Power"), was a part. Louisiana Power and its sister companies, Arkansas Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc., were all public-utility subsidiaries of Electric Power & Light Corporation, one of the five subholding companies in the Electric Bond and Share Company holding company system. In 1938, in *Electric Bond and Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419, this Court determined that the registration provisions of the Act were constitutional and that Electric Bond and Share Company must register thereunder. Thereafter, the Securities and Exchange Commission instituted proceedings under Section 11 (b) of the Act against Electric Bond and Share Company and certain of its subsidiaries, as a consequence of which an order was entered in 1942, directing the dissolution of certain of the subholding companies of the Electric Bond and Share system, including Electric Power & Light Corporation. The Securities and Exchange Commission's dissolution order was upheld by this Court in 1946 in *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90, sustaining the constitutionality of the provisions of Section 11 (b) (2) of the Act.

On March 1, 1949, pursuant to Section 11 (e) of the Act, the S. E. C. approved a plan for the dissolution of Electric Power & Light Corporation[1] In connection with that plan, the S. E. C. approved the creation of Middle South Utilities, Inc. ("Middle South"), a respondent herein, as a holding company to take over certain of Electric Power & Light Corporation's holdings, including those of respondent, Louisiana Power, and the other three public-utility companies mentioned above. At the same time, the S. E. C. reserved jurisdiction to conduct such further proceedings under Section 11 (b) (1) (Appendix, *infra*, pp. 49–50) in respect of the Middle South holding company system and its several subsidiaries as might be necessary or appropriate.[2]

Each of Middle South's four subsidiaries at that time owned and operated electric utility assets and gas utility assets. In addition, certain of them owned and operated non-utility assets. Subsequent to Middle South's organization and prior to January 29, 1953, Arkansas Power & Light Company disposed of its transportation and gas assets,[3] and Mississippi Power & Light Company disposed of its gas assets.[4] Louisiana Power continued to operate electric, gas, and water assets, and New Orleans Public Service,

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[1] *Electric Power & Light Corporation*, 29 S. E. C. 52.

[2] *Electric Power & Light Corporation*, Holding Company Act Release No. 8906 (1949).

[3] *Middle South Utilities, Inc.*, 32 S. E. C. 1 (gas properties); *Arkansas Power & Light Company*, Holding Company Act Release No. 10300 (1950) (transportation properties).

[4] *Mississippi Power & Light Company*, 33 S. E. C. 13.

Inc., continued, and still continues, to operate electric, gas, and transportation assets.

On January 29, 1953, pursuant to Section 11 (b) (1) and other sections of the Act, the S. E. C. issued a notice and order for hearing directed *inter alia* to Middle South and Louisiana Power.[5] Among the issues enumerated as being the subject matter of the hearing was the following: "Whether Middle South and Louisiana [Power] should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana [Power] and, if so, what terms and conditions should be imposed in connection therewith." A copy of this notice and order for hearing was served upon the Louisiana Public Service Commission ("Louisiana Commission"), the petitioner below and a respondent in this Court, by registered mail (R. 136). A full hearing was conducted by the S. E. C. at which Middle South and Louisiana Power appeared, adduced evidence, and presented arguments to support the position that Middle South and Louisiana Power might retain Louisiana Power's gas properties as an additional integrated public-utility system within the proviso to Section 11 (b) (1). Although apprised of the hearing, the respondent Louisiana Commission failed to appear.

On March 20, 1953, the S. E. C. issued its findings and opinion, and ordered *inter alia* that Middle South and Louisiana Power divest themselves of all the non-

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[5] *Middle South Utilities, Inc.*, Holding Company Act Release No. 11687 (1953).

electric assets of Louisiana Power.[6] The S. E. C. concluded that Middle South and Louisiana Power had failed to establish that separation of the gas assets held by Louisiana Power would result in the "loss of substantial economies", as required by Clause (A) of Section 11 (b) (1) to justify the retention of those gas assets along with the electric assets of the Middle South System. The S. E. C.'s order, among other things, directed (R. 128) " * * * Middle South and its subsidiaries [to] dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by * * * Louisiana [Power] * * * in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder * * * "

No petition to review the March 20, 1953, order was filed within the 60-day period provided by Section 24 (a) of the Act (Appendix, *infra*, pp. 50–51).

Thereafter, pursuant to Section 11 (c) of the Act, the S. E. C. extended until March 20, 1955, the period of time within which Middle South and Louisiana Power might comply with the March 20, 1953, directive.[7] On November 10, 1954, Louisiana Power and Louisiana Gas Service Corp. ("Louisiana Gas"), a newly organized wholly-owned subsidiary of Louisiana Power, filed a joint application-declaration with the S. E. C. proposing, among other things, the transfer

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[6] *Middle South Utilities, Inc.*, Holding Company Act Release No. 11782 (1953) (R. 103).

[7] *Middle South Utilities, Inc.*, Holding Company Act Release No. 12475 (1954).

by Louisiana Power to Louisiana Gas of all the non-electric properties of Louisiana Power as a step in compliance with the divestment order (R. 136–137). The application-declaration stated that, while no definitive program for the ultimate divestment had at that time been developed, it was the intention of Louisiana Power to effect the divestment of the common stock of Louisiana Gas within a period of 18 months from the date Louisiana Gas was to begin operations.

After the filing of this application-declaration, respondent Louisiana Commission for the first time exhibited an interest in the S. E. C.'s Section 11 (b) (1) proceeding relating to the Middle South holding company system. In response to a notice[8] issued by the S. E. C. advising that interested persons could request a hearing on the application-declaration filed by Louisiana Power and Louisiana Gas, the Louisiana Commission by telegram dated December 22, 1954, requested a public hearing in this matter, and in addition, asked that the S. E. C. open the record in the Section 11 (b) (1) proceeding which had resulted in the divestment order of March 20, 1953 (R. 89). Thereafter, the Louisiana Commission filed with the S. E. C. a petition (R. 90) and a supplemental petition (R. 92). Additionally, at the suggestion of the S. E. C., it submitted an offer of proof (R. 1) together with a brief (R. 49), in support of its request to open the record. The evidence proffered

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[8] *Louisiana Power & Light Company*, Holding Company Act Release No. 12740 (1954).

did not purport to show that conditions had so changed since the entry of the March 20, 1953, order as to require a modification thereof. Rather, the offer of proof purported to establish that the evidence adduced at the hearing in 1953 by respondents Louisiana Power and Middle South, pertaining to the loss of economies which would result from separation of the gas properties, was incomplete (R.5). The Louisiana Commission also attacked the S. E. C.'s legal interpretation of the phrase "loss of substantial economies" made in connection with the entry of the 1953 order (R. 6–10, 56).

After receipt of this offer of proof, the S. E. C. published a notice with respect to the Louisiana Commission's request (R. 96),[9] heard oral argument thereon, and by order of September 13, 1955, denied the request to reopen (R. 133).[10] In holding that there was no basis for reopening the earlier proceeding, the S. E. C. emphasized in its findings that there were "no grounds for questioning * * * [its] earlier conclusion and no changed circumstances justifying a modification" of the 1953 order (R. 132).

The Louisiana Commission then filed its petition in the court below to review this order of September 13, 1955, and also stated that it sought review of the S. E. C.'s earlier order of March 20, 1953 (R. 63). Subsequently, the S. E. C. filed a motion, never acted upon by the court below, to dismiss the petition for

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[9] *Middle South Utilities, Inc.*, Holding Company Act Release No. 12892 (1955).

[10] *Middle South Utilities, Inc.*, Holding Company Act Release No. 12978 (1955).

review on the ground that it was in essence an attempt to appeal from an order as to which the time for appeal had long since expired.

The court below set aside the S. E. C.'s order denying the request to reopen the proceeding and also held that legal determinations made by the S. E. C. in its 1953 decision were erroneous (R. 134–143). Specifically, the court found that the S. E. C., in refusing to reopen the earlier proceeding, had misinterpreted the penultimate sentence in Section 11 (b), providing that the S. E. C. might revoke or modify a previous order entered under that subsection if "it finds that the conditions upon which the order was predicated do not exist." Under the court's interpretation, the S. E. C. is required to reopen an earlier divestment order, even where there has been no change in conditions after the entry of the original order, if it can be shown that "the conditions on which the order was predicated were not truly the actual conditions" (R. 138). The court did not itself find that "the conditions on which the order was predicated were not truly the actual conditions," but concluded that the S. E. C. had erred in failing to consider the Louisiana Commission's offer of proof, "which, if as alleged by [the Louisiana Commission], would have presented an entirely different picture" (R. 138, 141).

With respect to the legal determinations in the 1953 proceeding, the court held that the S. E. C. had misinterpreted Clause (A) of Section 11 (b) (1) in two respects: first, in holding that the phrase "loss of substantial economies" should be interpreted to mean a loss only to the additional integrated public-

utility systems sought to be retained, without considering whether there is a loss to the principal integrated public-utility system as well (R. 139–141); and second, in holding that a loss is not "substantial" within the meaning of the statute if it would not cause "a serious economic impairment of the system" sought to be retained, such as to render it incapable of independent economical operation (R. 141–142).

The court remanded the proceeding to the S. E. C. for its consideration in light of the court's interpretation of the Act.[11]

SUMMARY OF ARGUMENT

I

By petitioning the S. E. C. to reopen a concluded Section 11 (b) (1) proceeding and appealing from the denial of the petition, the respondent Louisiana Commission has obtained review in the court below of the S. E. C.'s original order long after the time to seek review of that order had expired. This extraordinary result stemmed from a combination of erroneous interpretations by the court below of the language of Section 11 (b).

The court first relied upon statutory language permitting the S. E. C. to revoke or modify a previous Section 11 (b) order "if, after notice and oppor-

[11] It directed that further consideration by the S. E. C. be "restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system" and that the court's opinion was not to "be taken to authorize a reconsideration of any other features of the March 20, 1953 order" (R. 142).

tunity for hearing, it finds that the conditions upon which the order was predicated do not exist." The consistent administrative interpretation of this clause, which is in accord with what appears to have been the construction of the clause by this Court and other courts which have referred to it, is that it authorizes modification or revocation only in the light of changed circumstances—that the clause, in other words, was merely designed to make clear that Section 11 (b) orders, although final and binding, might nevertheless be modified in the discretion of the S. E. C. where such action is warranted by subsequent events. The court below determined, however, that the clause authorizes modification where the facts before the S. E. C. at the earlier hearing did not "truly" reflect "the actual conditions" existing at the time of the entry of the earlier order. This unusual construction is not compelled by the statutory language and is wholly inconsistent with the statutory direction to the S. E. C. to provide "as soon as practicable" for compliance by holding company systems with the standards of Section 11 (b). It is also inconsistent with the judicial review provisions of the statute, which limit the time to review Section 11 (b) orders to 60 days after entry. In addition, when additional evidence is sought to be taken in connection with such review, the statute requires a showing of "reasonable grounds for failure to adduce" such evidence earlier—a test that the Louisiana Commission probably could not have met in this case, judging from

its inconsistent statements as to the reasons for its failure to appear earier before the S. E. C.

In any event, even apart from the consistent administrative construction of the clause, the court below erred as to the availability and scope of review at this stage. Relying upon a statutory provision making Section 11 (b) orders directly reviewable, the court assumed that the 1955 order denying reopening of the previous proceeding was not only reviewable but also permitted the court to consider and reverse legal determinations made by the S. E. C. in its 1953 order. Since there is no specific provision in the Act for an order denying a petition for modification, it is doubtful whether any review of such action was intended. But even if review in some instances might be available from the denial of a petition for modification, the denial must nevertheless be non-reviewable where the petition does not allege a subsequent change in circumstances, since in essence the petition in this situation is merely a petition for rehearing, the denial of which is clearly non-reviewable. Moreover, even if some review of the S. E. C.'s 1955 action might have been appropriate, the court erred in holding that its review was "not circumscribed by the rules applying to review of discretionary acts." Such rules are applicable here, for the S. E. C.'s statutory power to modify a previous Section 11 (b) order is phrased in discretionary language. In this connection, it is clear that the S. E. C. properly exercised its discretion in refusing to reopen the proceeding at the instance of a party which had been duly

notified of the original proceeding but had taken no part therein and whose offer of proof did not indicate that the S. E. C.'s original factual conclusions were incorrect.

If this Court should conclude, in accord with the S. E. C.'s construction, that Section 11 (b) authorizes modification of a prior order only in changed circumstances, or that in any event the court below erred as to the availability or scope of judicial review, a reversal is required and this Court need not consider the issues (discussed *infra* under Point II) dealing with the correctness of the S. E. C.'s substantive legal determinations in the earlier proceeding culminating in the 1953 order.

II

As an exception to the policy of Section 11 (b) (1) of limiting a holding company system to a "single integrated public-utility system," retention of additional systems is permitted if they meet certain conditions, including the requirement that "Each of such additional systems cannot be operated as an independent system without *the loss of substantial economies* which can be secured by the retention of control by such holding company of such system" (emphasis added). The S. E. C., partly in reliance upon the legislative history of the Act, has consistently interpreted this provision to refer only to the potential loss which would be suffered by the additional systems (as distinguished from the principal system) and, moreover, has taken the position that the loss must be substantial enough to cause such a serious economic

impairment as would preclude the additional systems from operating economically under separate ownership. The Court of Appeals for the District of Columbia Circuit has specifically approved these tests. The court below, however, held that the "loss of substantial economies" relates to the principal system as well as to the additional systems, and that the word "substantial" means something less than the S. E. C.'s criterion. The court completely disregarded the legislative history on the ground that the statutory language was clear. However, that language, on its face, appears to be more consistent with the construction of the S. E. C. and of the Court of Appeals for the District of Columbia Circuit than that of the court below.

ARGUMENT

INTRODUCTION

In the Public Utility Holding Company Act of 1935, Congress determined that "the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected" by reason of enumerated abuses, resulting from the unregulated use of the holding company device in the aggregation of large gas and electric enterprises (Section 1 (b)). By reason of the persistent and wide-spread nature of these abuses—including "the growth and extension of holding companies" which bear "no relation to economy

of management and operation or the integration and coordination of related operating properties" (Section 1 (b) (4))—Congress concluded that it was necessary to "compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided" (Section 1 (c)).

In accordance with this policy, Section 11, recognized by this Court as the "very heart of the title,"[12] was designed to produce the orderly elimination of unnecessary holding companies and the integration and simplification of the holding company systems permitted to continue. Section 11 (b) sets forth the specific statutory standards with which holding company systems must conform, and provides that the S. E. C., "as soon as practicable after January 1, 1938," shall "require by order, after notice and opportunity for hearing", such action as it finds necessary to bring about conformity with these standards. Other subsections of Section 11 prescribe procedures whereby orders entered pursuant to Section 11 (b) are effectuated through fair and equitable plans which must be approved by the Commission. See Sections 11 (d) and 11 (e). The basic directive, however, is the S. E. C. order entered pursuant to Section 11 (b).

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[12] See *North American Company* v. *Securities and Exchange Commission*, 327 U. S. 686, 704, n. 14, where this language was quoted from S. Rep. 621, 74th Cong., 1st Sess., p. 11.

As noted in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission,* 134 F. 2d 747, 751 (C. A. 3): "The orders to be entered by the Commission under section 11 (b) are fundamentally directions that the companies involved achieve a stated result in integration of operations, divestment of non-integrated properties, simplification of corporate structure or distribution of voting power in order to meet the standards established by the section."

Section 11 (b) orders are specifically made reviewable by the last sentence of that subsection in accordance with the general review provisions of Section 24 of the Act. Section 24 (a) (Appendix, *infra,* pp. 50–51) authorizes review in a court of appeals by the filing of a petition within sixty days after the entry of an order of the Commission, and subsection (b) provides that the commencement of such review shall not automatically operate as a stay. Under Section 11 (c), orders under Section 11 (b) are required to be complied with within one year, but upon a proper showing the Commission is authorized to grant an additional year. Congress also provided that a Section 11 (b) order might be revoked or modified by the Commission "if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

The order of March 20, 1953, which respondent Louisiana Commission sought to have reconsidered by the S. E. C., was a direction to the respondents Middle South and Louisiana Power to divest their non-electric assets pursuant to Section 11 (b) (1) (Appendix, *infra,* pp. 49–50)—the subsection adopted

to compel holding companies "to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties."[13] Under Section 11 (b) (1), a holding company must normally limit its operations to a "single integrated public-utility system," but additional systems may be retained if they are found to meet certain qualifications, including the qualification set forth in Clause (A) here at issue that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system."

I

WHERE A PROCEEDING UNDER SECTION 11 (b) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 HAS BEEN CONCLUDED, AND NO TIMELY DIRECT REVIEW OF THE ORDER OF THE SECURITIES AND EXCHANGE COMMISSION HAS BEEN SOUGHT, AND THERE IS NO SHOWING OF A CHANGE IN THE CIRCUMSTANCES EXISTING AT THE TIME OF THE ORDER, THE ORDER IS NOT OPEN TO SUBSEQUENT ATTACK ON JUDICIAL REVIEW OF THE COMMISSION'S DENIAL OF A PETITION TO REOPEN THE CONCLUDED PROCEEDING

Through the device of appealing from an order denying a petition to reopen, respondent Louisiana Commission obtained in the court below a review of a Section 11 (b) order which was no longer subject to direct review since the time for appeal had expired more than two years earlier. We shall demonstrate

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[13] *North American Co.* v. *Securities and Exchange Commission*, fn. 12, *supra*, 327 U. S. at 704.

that, in permitting this collateral attack upon a "final and binding" [14] directive of the S. E. C., the court below adopted a strained statutory construction which is wholly at odds with the aim of Congress to have compliance with Section 11 (b) effected "as soon as practicable." [15]

As authority for its action, the court below relied upon the last two sentences of Section 11 (b), which provide that:

> The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

The first of these sentences has been consistently interpreted by the S. E. C. as permitting modification or revocation of Section 11 (b) orders only "in the light of changed circumstances" since the order was issued.[16] The court below, while apparently not ex-

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[14] *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 747, 751 (C. A. 3). *Cf. Skowhegan Savings Bank* v. *Securities and Exchange Commission*, 201 F. 2d 702, 705 (C. A. D. C.); *In re, Community Gas & Power Co.*, 168 F. 2d 740, 744 (C. A. 3), certiorari denied, 334 U. S. 846; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274, 275 (C. A. 2), certiorari denied, 318 U. S. 786.

[15] See Sections 1 (c) and 11 (b) of the Act.

[16] *Community Gas and Power Company*, 15 S. E. C. 492, 500; *West Texas Utilities Company*, 21 S. E. C. 566; *The Middle West Corporation et al.*, 22 S. E. C. 87; *The North American Company*, 28 S. E. C. 742, 747–760; *International Hydro-Electric System*, 30 S. E. C. 631; *International Hydro-Electric Sys-*

cluding the propriety of modification on the basis of changed circumstances, interpreted the statutory language also to permit modification where "it can be shown that the conditions on which the order was predicated where not truly the actual conditions," or, otherwise stated, that modification might "be based on the facts as they existed at the time of the order which is to be modified" (R. 138).

The second of the statutory sentences quoted above makes clear that Section 11 (b) orders are directly reviewable pursuant to the general provisions for review contained in Section 24, under which the time for filing a petition for review is limited to 60 days. The S. E. C.'s position is that, once the sixty-day period has elapsed without any petition for review having been filed, the order is no longer subject to challenge by an attack upon the conditions found to have existed when the order was entered. The court below held, however, that this sentence authorizing review of Section 11 (b) directives permitted it, on review of an S. E. C. order refusing to reopen an earlier proceeding, to require the S. E. C. to consider matters which could have been, but were not, presented in the earlier proceeding, and to apply legal standards different from those which it had previously applied.

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tem, Holding Company Act Release Nos. 13044, pp. 10–14 (1955), enforced, D. C. Mass., Civil Doc. No. 2430 (unreported), affirmed *sub. nom. Equity Corp.* v. *Brickley*, 237 F. 2d 839 (C. A. 1), certiorari denied, 352 U. S. 989; *Standard Power and Light Corp.*, Holding Company Act Release No. 13101, pp. 9–11 (1956).

The decision below cannot be sustained unless in the interpretation of both sentences the court's view is correct and that of the S. E. C. is wrong. If the court erred as to either sentence—as to the S. E. C.'s authority to reopen, or as to the availability or scope of judicial review—a reversal is required and the Court need not consider issues (discussed *infra*, pp. 36–47) involving the S. E. C.'s substantive legal determinations in the proceeding concluded in 1953.

A. THE COURT BELOW ERRED IN HOLDING THAT SECTION 11 (b) AUTHORIZES THE REOPENING OF A CONCLUDED PROCEEDING EVEN IN THE ABSENCE OF A CHANGE IN CIRCUMSTANCES

Reconsideration of an order, years after the time to seek review has expired, on the ground that the record upon which it was entered was faulty, is rarely permitted by an administrative agency. Even more infrequent is a situation in which such agency reconsideration is *required* by a reviewing court. We are, in fact, aware of no case where the mere fact that a better showing might have originally been made, without a satisfactory excuse why it was not made, has been deemed sufficient ground to require reopening after the time for appeal has expired.[17] Under the holding below, however, merely upon an allegation that data in the original record before the S. E. C. was erroneous or incomplete, and even without

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[17] Compare Rule 60 (b) of the Federal Rules of Civil Procedure, which limits reconsideration on the basis of mistake, inadvertence, surprise, excusable neglect, or newly-discovered evidence, *inter alia*, to "a reasonable time, and * * * not more than one year after the judgment, order, or proceeding was entered or taken."

any allegation of a change in conditions, a "person or party aggrieved" could obtain at any time in the indeterminable future a reopening of a concluded proceeding in which a "final and binding" Section 11 (b) order has been rendered.

Such an unusual result could be reached only if the statutory language is so clear that it precludes any other interpretation or, if ambiguous, that it is wholly consistent with the aim of the statute.[18] The court below recognized that its interpretation was not expressly required by the statutory language.[19] While the statutory language, taken out of context, might possibly be susceptible to the construction given it by the court, we submit that a more natural construction is that the words "conditions upon which the order was predicated do not exist" mean only that the conditions no longer exist. Had Congress intended to permit a rehearing only on the basis of the facts actually existing when the original order was entered, it would presumably have said, instead, "conditions upon which the order was predicated *did* not exist"; and if both

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[18] It is the "well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U. S. 1, 31. *Cf. United States* v. *Public Utilities Commission*, 345 U. S. 295, 315; *United States* v. *American Trucking Associations*, 310 U. S. 534, 542.

[19] The court said: "The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order" (R. 138).

situations were intended to be covered (*i. e.*, a rehearing on the basis of existing facts, as well as a modification on the basis of change), as the court below appears to have held, this could easily have been made clear by adding to the end of the sentence "or did not then exist."

That Congress did not do so was not because of any lack of precision of draftsmanship but rather was because there was no logical purpose to be achieved by this result and, moreover, because the result would have been wholly inconsistent with the statutory aim to provide "as soon as practicable" for compliance with the standards of Section 11 (b). The court's ruling would destroy the finality of Section 11 (b) determinations, since a "person or party aggrieved" would generally find little difficulty in pointing to some fact not brought to the S. E. C.'s attention in the original proceeding as a basis for securing a reopening.[20] It would permit proceedings which had

[20] Moreover, in the hope of preventing this possibility, the S. E. C. in future proceedings under Section 11 (b) would be placed under the impossible burden of seeking out and placing in evidence all possible facts bearing on all issues, including facts required to disprove that a company comes within an exception to the general standards required for retention of an additional system under the Act—a result contrary to accepted principles relating to the burden of proof. See, *e. g.*, *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1; *Ryan* v. *Carter*, 93 U. S. 78; *Walling* v. *Reid*, 139 F. 2d 323 (C. A. 8). In the *Schlemmer* case, Mr. Justice Holmes pointed out that a proviso "merely creates an exception, which has been said to be the general purpose of such clauses" and that "if the defendant wished to rely upon * * * [the] proviso, the burden was upon it to bring itself within the exception." 205 U. S. at 10.

been closed and terminated to be opened on the theory, as here, that a better case could have been made by a person not appearing in the previous proceeding had he but chosen to appear. Moreover, a holding made in connection with the issuance of an original Section 11(b) order and upheld by one court of appeals could be re-examined by another court of appeals after the denial by the S. E. C. of a petition to reopen, since under Section 24 (a) a "person or party aggrieved" may seek review either in the Court of Appeals for the District of Columbia Circuit or in the court of appeals where he resides or has his principal place of business.[21] The desirable purpose of having a Section 11 (b) order give certainty to the direction to be followed by holding company systems in complying with the standards of Section 11 (b) would be defeated, and holding company systems, which were in-

[21] Whether or not a court of appeals could require a person who sought review of the original order in a different circuit to return to that circuit on review of a denial of a petition to reopen the earlier proceeding, it would seem that under no circumstances could a court of appeals preclude a different person from seeking review in a forum other than that in which review was sought of the original order. This was the situation in the *International Hydro-Electric System*, 12 S. E. C. 999, where a Section 11 (b) order directed to that system was affirmed by the Court of Appeals for the Sixth Circuit in *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475; several years later, on a petition to review filed by a different person, the S. E. C.'s dismissal of an application to modify that order was affirmed by the Court of Appeals for the Second Circuit. *Protective Committee* v. *Securities and Exchange Commission*, 184 F. 2d 646. In the latter case, the court re-affirmed determinations made in connection with the original order but its opinion dealt for the most part with events which had occurred subsequent to the original ruling.

tended to be given in the first instance the opportunity to devise the means for working out their problems under Section 11 (b), would in all probability be reluctant to comply with such impotent orders.[22] Moreover, the rehearings required would necessitate long preparation, involved and sometimes protracted administrative proceedings, and the possibility of time-consuming appeals.[23]

The interpretation of the court below is also inconsistent with the review provisions contained in Section 24 of the Act which make clear that a person or party seeking court review of either the legal or factual determinations embodied in a Section 11 (b) order must do so within sixty days. So that there may be an end to litigation, the rule is that failure to file a timely petition for review, as a jurisdictional matter, precludes appellate review.[24] Accordingly, if on De-

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[22] See Section 11 (e) of the Act. And see *Phillips* v. *Securities and Exchange Commission*, 185 F. 2d 746, 750–751 (C. A. D. C.). See also S. Rep. 621, 74th Cong., 1st Sess., p. 13, and Additional Views of Congressman Eicher appended to H. Rep. 1318, 74th Cong., 1st Sess., p. 50, wherein he states: "If the compulsions of the act are made sufficiently clear to convince the interlocking lawyers of the holding-company bankers that it can't be evaded or compromised, the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart."

[23] See our petition for certiorari, pp. 13–17, for a discussion of the number of utility systems which might seek reopenings of Section 11 (b) orders under the opinion below.

[24] Statutory requirements with respect to the time for seeking appellate review in the federal courts are considered mandatory and jurisdictional, and are normally not subject to extension by waiver, consent, acquiescence, or even by the order of the court. See *Lasky* v. *Commissioner*, No. 371, this Term, decided March

cember 22, 1954, the day the petition for reopening was filed, the respondent Louisiana Commission had instead filed in a court of appeals a petition to review the 1953 order, that petition obviously would have had to be dismissed for lack of jurisdiction.[25] Yet the respondent accomplished the same result—*i. e.*, secured review of factual and legal determinations made in the earlier order—through the device of appealing from an S. E. C. order denying a reopening.

Also, through indirection, the Louisiana Commission has circumvented the provision in Section 24 (a) that where "application is made to the court for leave to adduce additional evidence" it is required to be shown not only "that such additional evidence is material"[26] but also "that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission." The Louisiana Commission was given notice of the hearing and opportunity to present evidence establishing that the gas properties could not be divested without a "loss of substantial economies." It did not see fit to appear at that time. After

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11, 1957; *Columbia Oil & Gasoline Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 265 (C. A. 3); *United States* v. *Ragen*, 171 F. 2d 788 (C. A. 7) certiorari denied, 337 U. S. 910; *St. Luke's Hospital* v. *Melin*, 172 F. 2d 532 (C. A. 8).

[25] Cf. *In re Community Gas & Power Co.*, 168 F. 2d 740, 744 (C. A. 3), certiorari denied, 334 U. S. 846; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274, 275 (C. A. 2), certiorari denied, 318 U. S. 786.

[26] Petitions under Section 24 (a) were denied on this ground in *Central & South West Utilities Co.* v. *Securities and Exchange Commission*, 136 F. 2d 273, 275 (C. A. D. C.), and in *Koppers United Co.* v. *Securities and Exchange Commission*, 138 F. 2d 577, 581 (C. A. D. C.).

the order of March 20, 1953, was entered, the Louisiana Commission had the opportunity to petition for a rehearing "within 5 days after issuance of the order complained of," in accordance with Rule XII (e) of the S. E. C.'s Rule of Practice (17 C. F. R. 201.12 (e)). No such petition was filed. And the subsequent statements made on behalf of the Louisiana Commission, in attempting to explain its failure to appear sooner, were inconsistent. In its brief filed with the S. E. C. on May 2, 1955, in support of its petition to reopen, the Louisiana Commission stated, as a reason for not appearing in the original proceeding, that it had not "at that time made a study of the effects of a disposition by Louisiana [Power] such as was subsequently ordered by S. E. C." (R. 50). However, on July 7, 1955, at the oral argument before the S. E. C., counsel for the Louisiana Commission stated that the Louisiana Commission "did not appear originally in these proceedings, and through a clerical mishap, though the notice was received from this Commission [S. E. C.] about the proceedings which were tried in February, 1953, the members of the [Louisiana] Commission were not notified personally and did not know that the hearing had gone on when it did" (R. 78, Doc. 108, p. 10). The Louisiana Commission's statements would not seem to constitute "reasonable grounds" for its failure to have adduced "additional evidence" in the proceeding before the Commission.[27]

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[27] *Cf.* Rule 60 (b) (2) of the Federal Rules of Civil Procedure, where newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial * * *" is stated as a ground for reopening a final order."

In the S. E. C.'s view, the penultimate sentence of Section 11 (b) serves a rational purpose which is wholly in accord with the aim of the statute to bring about reasonably prompt compliance with the standards of Section 11 (b) and is consistent with other provisions of the Act. This sentence, we believe, was inserted to make clear that, despite the fact that Section 11 (b) orders are final and binding determinations, they might be modified at the S. E. C.'s discretion where subsequent changes of circumstances warrant such action.[28] For example, under Section 11 (b) (1), the S. E. C. might have originally ordered that a registered holding company should be permitted to continue to control an "additional integrated public-utility system", finding among other things that the additional system could not be operated as an independent system without the loss of substantial economies. In this situation, to carry out the statutory purpose, it is necessary that the S. E. C. should not be precluded, at a subsequent date and after a change in the conditions upon which it had initially relied, from determining that severance would no longer result in the loss of substantial economies and from thereupon ordering divestment. Or, where there has been a directive to divest, conditions might so change during the period prior to compliance as to make the earlier directive inappropriate. In the absence of a specific statutory provision, there might be some doubt whether the S. E. C., as an administra-

[28] *Cf. Mine Workers* v. *Eagle-Picher Co.*, 326 U. S. 335, 342, where this Court discussed a similar provision in the National Labor Relations Act.

tive agency, would be able to remedy the situation by modification or reversal of earlier Section 11 (b) orders, particularly since these were made subject to direct court review and could be judicially enforced.[29] Congress chose to leave no doubt respecting such an important matter and explicitly made provision, in the sentence under consideration, for the Commission to revoke or modify a Section 11 (b) order where it "finds that the conditions upon which the order was predicated do not exist."

As previously noted, the S. E. C.'s construction has been consistent and its construction, as the agency administering the statute, should be controlling unless plainly erroneous.[30] The S. E. C.'s interpretation,

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[29] This Court was subsequently divided on such an issue in *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335. The majority held that an order of the National Labor Relations Board which had been enforced by a court decree was not subject to challenge nearly two years after the entry of the decree. In so ruling, the Court stated (325 U. S. at 340): "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation." The Court further declared that "[a]dministrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction" (325 U. S. at 341). But compare the dissenting opinion (especially 325 U. S. at 355–356).

Section 20 (a) of the Act, giving the S. E. C. the power "to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions" of the Act may have been too general to provide clear authority to resolve this problem.

[30] *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 309, 310; *National Labor Relations Board* v. *Denver Building Council*, 341 U. S. 675, 691–692; *Bowles* v. *Seminole Rock & Sand Co.*,

moreover, contrary to an intimation in the opinion of the court below (R. 138, fn. 4), is fully in accord with *American Power & Light Company* v. *Securities and Exchange Commission*, 329 U. S. 90, 121, where this Court declared that companies ordered by the S. E. C. to be dissolved were not precluded during the period of compliance "from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist." This statement does no more than repeat the statutory language and, if anything, presumably refers to the S. E. C.'s suggestion in its brief in that case that modification might be appropriate in the event of a change in conditions which might have occurred after the entry of the orders and before compliance was

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325 U. S. 410, 413–414; *United States v. American Trucking Associations*, 310 U. S. 534, 549. The importance of the S. E. C.'s construction of the Act here involved was discussed in *Securities and Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (C. A. 2):

"Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction. *Norwegian Nitrogen Products Co.* v. *United States*, 228 U. S. 294, 315 * * *."

And see *North American Utility Securities Corp.* v. *Posen*, 176 F. 2d 194, 197 (C. A. 2). *Cf. American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 112; *Securities and Exchange Commission* v. *Central-Illinois Corp.*, 338 U. S. 96, 126–127.

completed.[21] See also *Central & South West Utilities Co.* v. *Securities and Exchange Commission*, 136 F. 2d 273 (C. A. D. C.), where the court, in denying petitioner's motion to introduce additional evidence pursuant to Section 24 (a) on appeal from a similar order, stated that (136 F. 2d at 275): "Section 11 (b) authorizes the Commission to revoke or modify its order, after notice and hearing, in response to *changed* conditions * * *." (Emphasis added.) And see *Equity Corporation* v. *Brickley*, 237 F. 2d 839 (C. A. 1), where, on the basis of the penultimate sentence of Section 11 (b), the court held that, in view of the "drastically altered condition" of the holding company there involved, the S. E. C. had power to modify a previous dissolution order, despite the fact that an earlier order refusing to modify the plan had been affirmed on appeal.

B. IN ANY EVENT, THE COURT BELOW ERRED AS TO THE AVAILABILITY AND SCOPE OF JUDICIAL REVIEW OF THE COMMISSION'S REFUSAL TO REOPEN

Because the determination of the court below that there should be a reopening of the earlier proceeding was based, as we have shown, on its erroneous construction of the clause "that the conditions upon

[21] It was stated in the S. E. C.'s brief filed with this Court that if "petitioners could be transformed into holding companies which served the function of tying together properties satisfying the standards of Section 11 (b) (1) and needing a parent holding company, and if it appeared that either of petitioners would be an appropriate corporate vehicle for such purpose, then there would be room for modification of * * * [the S. E. C.'s] orders under the express provisions of Section 11 (b) applicable in the event of change of circumstance". (Brief for the S. E. C. in Nos. 6 and 7, 1945 Term, pp. 133–134.)

which the order was predicated do not exist," the S. E. C.'s 1955 order must be sustained. But, even if the court's construction of that clause were correct, reversal would still be required since the court erred both as to the availability and scope of review.

The court interpreted the last sentence of Section 11 (b) as making expressly reviewable the Commission's denial of the request to reopen. That sentence makes "any order made under this subsection" subject to judicial review pursuant to Section 24 of the Act. However, the only "orders" mentioned in Section 11 (b) are the orders directing that certain action be taken to comply with the standards thereof and the orders revoking or modifying such orders; there is no mention of orders *denying* a request for modification or revocation. Every action of the S. E. C. which it designates as an "order" is not necessarily considered to be an order within the meaning of the review provisions.[22] As we have noted, the importance of a Section 11 (b) directive, issued after notice and opportunity for hearing, requires that it be directly reviewed, and for the same reason the revocation or modification thereof, after notice and opportunity for hearing, should be directly reviewed. However, whether review was intended for Commission action which did not revoke or modify the existing directive

[22] Petitions for review of "orders" in Section 11 (b) proceedings have been dismissed, for example, in *Phillips* v. *Securities and Exchange Commission*, 171 F. 2d 180 (C. A. 2); *Eastern Utilities Associates* v. *Securities and Exchange Commission*, 162 F. 2d 385 (C. A. 1), and *Okin* v. *Securities and Exchange Commission*, 143 F. 2d 960 (C. A. 2). *Cf. Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385.

as to a particular holding company system—which merely maintained the status quo—is at least doubtful.

Assuming *arguendo* that under certain circumstances there may be review of an order *denying* revocation or modification, we contend that such review would nevertheless be unavailable from the denial of a petition to reopen to the extent that the petition is based on facts which existed at the time of the original hearing. In other words, even if the penultimate sentence of Section 11 (b) should be construed to authorize the S. E. C. to revoke or modify a prior order upon a finding that the conditions upon which it was predicated did not truly exist at the time of the entry of the original order, it does not follow that denial of a petition to reopen made upon such a ground would be reviewable. Indeed, it would be unreasonable to assume that Congress intended more than to make clear that the S. E. C., in its discretion, might reconsider its previous order upon the basis of a corrected record. There is no reason why denial of such a petition, which is in essence only a petition for rehearing, should be any more subject to review than denial of any other petition for rehearing, the normal basis for which is also that the original record was faulty. And it is settled law that the denial of a petition for rehearing is wholly discretionary and is not reviewable. *Roemer* v. *Bernheim,* 132 U. S. 103, 106.

Particularly after the time for appeal has expired, it is clear that a party may not "reinvest himself" with the right of appeal by filing a petition for rehearing. *Conboy* v. *First National Bank of Jersey*

City, 203 U. S. 141, 145; cf. *Lasky* v. *Commissioner,* No. 371, this Term, decided March 11, 1957. Indeed, even where an agency has reopened a record to reconsider a particular aspect thereof, this Court has held that it was reversible error for a court of appeals to require the agency to grant a petition to reopen the entire proceeding. *Interstate Commerce Commission* v. *City of Jersey City,* 322 U. S. 503. The Court there stated: "It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body" (322 U. S. at 514–515).[33] This principle has been applied to the denial of a petition for reconsideration of an order under Section 11 (e) of the Holding Company Act designed to effect compliance with Section 11 (b). See *Skowhegan Savings Bank* v. *Securities and Exchange Commission,* 201 F. 2d 702 (C. A. D. C.), where the court stated that such a denial was "not in and of itself appealable under the statute."[34]

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[33] No greater rights have been afforded by the Administrative Procedure Act, since the introductory clause of Section 10 (5 U. S. C. 1009), the section dealing with judicial review of agency action, specifically excepts from its terms the situation where "agency action, is by law committed to agency discretion."

[34] In the instant case, it is clear that the S. E. C., in its discretion, merely denied the Louisiana's Commission petition for reopening; it did not grant reopening and then deny modification on the merits. As the S. E. C. pointed out (R. 131–132), it considered the offer of proof and arguments merely to determine whether the record should be reopened. Having determined not to grant the petition to reopen, there was no occasion to receive evidence, either for or against the retention of

Finally, even if this Court should disagree with the foregoing analysis and conclude that some review of the S. E. C.'s order was appropriate, we submit that the court below nevertheless erred in holding that its review was "not circumscribed by the rules applying to review of discretionary acts" (R. 138). The penultimate sentence of Section 11 (b), it should be noted, provides only that the Commission "may" revoke or modify its previous order, whereas other provisions of Section 11 (b) use mandatory language (as, for example, that involved in Point II, *infra*, that the Commission "shall" permit retention of additional public utility systems where certain requirements are met). In view of the discretionary nature

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Louisiana Power's gas properties, and no such evidence was received. Accordingly, the question of whether, upon a reopened record, a subsequent reaffirmance of the original order might have been reviewable, as appears to be the rule in certain bankruptcy cases, is not here involved. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; and *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144. These cases hold that such review is available only where there has been a grant of a petition to reopen and an evidentiary hearing. As pointed out in the *Pfister* case, *supra*, (317 U. S. at 150): "* * * where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order." Similarly, in the *Skowhegan* case, *supra* (201 F. 2d at 705), where a plan under Section 11 of the Holding Company Act was involved, the court said: "The petition for reconsideration, and its denial, even after extended discussion, could not serve to enlarge the statutory period for appeal."

of the pertinent language, it would appear that judicial review, if any, must be limited to a consideration of whether there had been an abuse of discretion. No such abuse, we believe, can be shown here. In denying the petition of the Louisiana Commission, the S. E. C. pointed out (R. 131):

> We are of the opinion that no basis for reopening the proceedings culminating in our order of March 20, 1953 has been shown. Those proceedings involved a full hearing at which Louisiana Power, and its parent, Middle South Utilities, Inc., appeared, adduced evidence and presented arguments that Louisiana Power could retain its gas properties consistently with the standards of Section 11 (b) (1) of the Act. The Louisiana Commission, although duly notified of the proceedings, did not appear and took no part therein. After full consideration we issued a Findings and Opinion which set forth in detail the reasons why the standards of Section 11 (b) (1) would not permit the retention of the non-electric properties of Louisiana Power. No petition for a review of our order was filed.

The S. E. C. also noted that the Louisiana Commission, in its offer of proof, did not allege or indicate that the S. E. C.'s original factual conclusions were incorrect (R. 131–132). In view of the foregoing considerations, coupled with the lack of any change in circumstances,[35] an abuse of discretion is not shown

[35] The fact that in the instant case the offer of proof submitted by the Louisiana Commission was based in part on a study derived from more recent data than had been available at the original hearing does not indicate any such change, nor

merely on the basis of the alleged differences from the original record that the Louisiana Commission offered to prove. Particularly is this so in view of the desirability of having an end to litigation and in view of the Congressional mandate to secure compliance with the Act's standards "as soon as practicable."

II

UNDER SECTION 11 (b) (1) (A), THE "LOSS OF SUBSTANTIAL ECONOMIES"—A PREREQUISITE TO RETENTION BY A REGISTERED HOLDING COMPANY OF "ADDITIONAL SYSTEMS"—REFERS ONLY TO A LOSS WHICH WOULD BE INCURRED BY THE "ADDITIONAL SYSTEMS" AND WHICH WOULD CAUSE SUCH SERIOUS ECONOMIC IMPAIRMENT TO THE "ADDITIONAL SYSTEMS" AS TO PREVENT THEIR EFFICIENT OPERATION UNDER SEPARATE OWNERSHIP

As noted earlier (pp. 14–15), in order to eliminate pre-existing abuses and to effectuate the policy of divesting holding company systems "of properties detrimental to the proper functioning of such systems", Section 11 (b) (1) of the Act requires that the operations of each registered holding company system be limited to a "single integrated public-utility system" and to certain incidental businesses. By a

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did the court below so find. There was clearly no such change in conditions as would empower a court to determine that the S. E. C. abused its discretion in refusing to reopen the earlier proceedings on this ground. Cf. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514: "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order."

proviso to Section 11 (b) (1), however, retention of one or more additional systems is permitted as an exception to this integration requirement if it can be demonstrated that such retention meets the exacting requirements set forth in Clauses (A), (B), and (C) of the proviso. Clause (A), the only one of these clauses here involved, requires that a registered holding company, to retain additional systems, must show that—

> Each of such additional systems cannot be operated as an independent system without the *loss of substantial economies* which can be secured by the retention of control by such holding company of such system. [Emphasis added.]

The S. E. C. interpreted the italicized phrase "loss of substantial economies" to refer only to the potential loss which would be incurred by the additional system if there were divestment (R. 118). It also held that to permit retention the estimated loss had to be substantial enough to cause such a serious economic impairment as would preclude the additional system from operating efficiently under separate ownership (R. 117). The court below held that the S. E. C. erred in both respects—*i. e.*, it held that (*a*) the loss referred not only to the additional system sought to be divested but also to the principal system, and (*b*) the S. E. C.'s interpretation of substantial economies was in some undefined manner unduly restrictive

(R. 139–142).[36]. We show below that the S. E. C.'s interpretation is in accord with the policy of the Act as expressed in the legislative history, with the previous administrative constructions, and—until the ruling below—with the decisions of the courts.

A. THE COURT BELOW ERRED IN HOLDING THAT THE REQUIRED "LOSS" REFERS TO THE LOSS TO THE PRINCIPAL SYSTEM AS WELL AS TO THE LOSS TO THE "ADDITIONAL SYSTEMS"

The retention of an additional integrated system is by the very terms of Section 11 (b) (1) an exception to the general statutory scheme of limiting the holding company to a single integrated system. The underlying premise of that section is that an undue extension of the field of operations of a holding company system is not conducive to efficiency, or, in any event, does not result in efficiencies commensurate with the social and economic disadvantages involved. As was stated in the report of the National Power Policy Committee: "intensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism

[36] The court did not find that the S. E. C.'s conclusion that there were not substantial economies was erroneous but it held that in making its findings the S. E. C. had "refused to give weight to important facts which * * * would have presented an entirely different picture." It stated that the claimed losses of economies in the amount of $684,377 to the principal system added to the $272,816 of the additional system "constituted a sizable, if not a substantial, figure" (R. 141).

inimical to the functioning of democratic institutions and the welfare of a free people."[37]

In S. 2796, as first passed by the Senate, there were no provisions for the retention of additional systems under any circumstance. These provisions were amended by the House to permit the holding company to retain one or more additional systems where consistent with the public interest.[38] The House substitute was criticized on the ground that it was too indefinite as an effective administrative guide and so broad as to defeat the basic purpose of Section 11.[39] The present proviso, which was a compromise adopted in conference, set forth the limited circumstances under which retention of an additional system or systems would be permissible. The Statement of the Managers on the part of the House accompanying the Conference Report, after emphasizing explicitly

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[37] See Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., p. 4 (1935)) appended to S. Rep. No. 621, 74th Cong., 1st Sess. (1935). The National Power Policy Committee was an interdepartmental committee appointed by the President and composed of persons in the Government most concerned with the power problem. The first draft of what is now the Holding Company Act was prepared by the Committee in collaboration with leaders in the House and Senate. See Hearings Before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., p. 156 (1935).

[38] H. Rep. No. 1318 on S. 2796, 74th Cong., 1st Sess. (1935), p. 17.

[39] Letter of Joseph P. Kennedy, then Chairman of the S. E. C., 79 Cong. Rec. 10838 (July 9, 1935); additional views of Congressman Eicher, H. Rep. No. 1318 on S. 2796, 74th Cong., 1st Sess., p. 45 (1935).

that both the Senate and the House bills required the holding company to limit its operations to a single integrated system, pointed out:

> The substitute * * * makes provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system.[40]

This was also elaborated by Senator Wheeler, Chairman of the Senate Committee on Interstate and Foreign Commerce, and in charge of the bill, who orally reported the results of the conference to the Senate:

> Since both bills accepted the proposition that a holding company should normally be limited to one integrated system, my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion the Senate conferees concluded that the furthest concession they could make would be

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[40] H. Rep. No. 1903, 74th Cong., 1st Sess., p. 71 (1935).

In a discussion on the floor of the House on a motion to instruct the House conferees to adopt the compromise version of Section 11 (b) that was ultimately passed, Representative O'Connor, in support of the motion, envisaged, by way of illustration, the independence of "a little power plant in Florida" or "a little plant in Oklahoma" (79 Cong. Rec. 14168); and Representative Cooper, ranking minority member of the Committee on Interstate and Foreign Commerce, who had opposed the motion, had referred to systems retainable under Clause (A) as "unprofitable companies * * * too weak to stand alone" (*id.* at 14165–14166.)

> to permit the Commission to allow a holding company to control more than one integrated system if the additional systems were in the same region as the principal system and were so small that they were incapable of independent economical operation * * *.[41]

In short, Congress expected that an additional system able to stand alone—*i. e.*, capable of managing its own affairs—was to be given its independence.

As a corollary to this statutory scheme, it is implicit in Clause (A) that the loss of economies must be measured by its effects upon the additional systems alone, and not, as the court below holds, upon both the principal and additional systems.[42] Accordingly, the

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[41] 79 Cong. Rec. 14479 (Aug. 24, 1935). The Conference Report was accepted by the Senate (*id.* at 14473) just prior to Senator Wheeler's oral report on the conference and before the bill was signed by the President. Senator Wheeler's statement has been cited as a relevant aid to the interpretation of the statute. *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720, 725 (C. A. D. C.); *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 138 F. 2d 936, 941–942 (C. A. D. C.), vacated as moot, 322 U. S. 788.

This Court has recently noted the importance of an "explicit statement by the one most responsible" for the legislation. *Leedom* v. *International Union*, 352 U. S. 145, 150.

[42] Even if it be assumed *arguendo* that the "loss of economies" to the principal system had been a relevant factor, the court below also erred (R. 141, 142) in its apparent disagreement with the S. E. C.'s position that it would then be necessary to relate the loss to all the electric properties comprising the principal integrated public utility system retainable by Middle South (R. 118) rather than to the electric properties of Louisiana Power alone. An "integrated public-utility system", with respect to electric utility companies, is defined in Section 2 (a) (29) (A) of the Act as consisting of those utility assets, "whether owned by one or more electric utility companies" in

S. E. C.[43] and the Court of Appeals for the District of Columbia Circuit have held that the losses to be considered must relate solely to the additional system. In *Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F. 2d 936 (C. A. D. C.), the court pointed out that the question in that case was "whether or not the facts as they were revealed at the hearing give reasonable support to the Commission's conclusion that 'substantial economies' would not be saved to 'Virginia Gas' [the additional system] by reason of 'Virginia Electric's' [the principal sys-

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the holding company system, which the S. E. C. finds are physically interconnected and economically operated as a single coordinated system. Since the S. E. C. has found that the electric properties of all four electric utility companies in the Middle South system constituted the principal system in the Middle South holding company system; any loss of economies resulting from the separation of the gas properties of Louisiana Power from the principal system should be related to the entire principal system and not merely to a portion thereof, *i. e.*, Louisiana Power's properties. The difference in the result is significant. By comparing the losses of $957,193 anticipated by the Louisiana Commission (R. 141) with Louisiana Power's operating revenues of $29,631,158 for the year 1954, a percentage loss of 3.23% is reached; while if compared with the entire Middle South operating revenues of $143,569,552 for the year 1954, a percentage loss of only 0.67% results.

[43] Although the S. E. C., in some opinions, has not reached this question, finding that the overall losses that might be caused from severance were insubstantial, the Commission has specifically held that only the losses to the additional systems are relevant in *North American Co.*, 11 S. E. C., 194, 208, affirmed, 133 F. 2d 148 (C. A. 2), affirmed, 327 U. S. 686; *Philadelphia Co.*, 28 S. E. C. 35, 52, affirmed, 177 F. 2d 720, 724 (C. A. D. C.); and *General Public Utilities Corp.*, 32 S. E. C. 807, 838–839.

tem's] continued control of the former". Having stated that "substantial economies are important economies", the court held (138 F. 2d at 944): "The required importance must relate to the healthful continuing business and service of the *freed* utility" (*i. e.*, the additional system)." (Emphasis added.) This Court, in *North American Co.* v. *Securities and Exchange Commission,* 327 U. S. 686, indicated its concurrence with this view. Although the sole issue in that case was the constitutionality of Section 11 (b) (1), in summarizing the provisions of that section the court said (327 U. S. at 696–697): "In essence, it confines the operations of each holding company system to a single integrated public utility system with provision for the retention of *additional systems* only if *they* are relatively small, located close to the single system and unable to operate economically under separate management without the loss of substantial economies * * *." [Emphasis added.]

The court below, in holding that the losses should be examined in connection with both the principal and additional systems, completely discounted the legislative history, stating (R. 139–140) that "the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference

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[44] See also *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720 (C. A. D. C.), where, despite the fact that this question was fully briefed by the parties, the court in its rather extended opinion made no reference to the alleged savings to the principal system except to comment in a footnote that the company's witness "also testified" as to the amount that separation would increase the expense of the principal electric system (177 F. 2d at 724, n. 17).

to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear." The court's construction, however, is surely no more "clear" than the S. E. C.'s construction. If anything, the contrary is true. The normal reading of the language, we believe, would be to relate "loss of substantial economies" only to the antecedent words "each of such additional systems." The legislative history is offered, not to overcome a literal interpretation of the pertinent language, but rather merely to confirm an interpretation which, at the very least, is as "clear" as that of the court below.

B. THE COURT BELOW ERRED IN HOLDING THAT THE REQUIRED "LOSS OF SUBSTANTIAL ECONOMIES" MAY BE SOMETHING LESS THAN A LOSS THAT WOULD CAUSE SUCH SERIOUS ECONOMIC IMPAIRMENT TO THE SYSTEMS INVOLVED AS TO PREVENT THEIR EFFICIENT OPERATION UNDER SEPARATE OWNERSHIP

Also consistent with the statutory scheme, as evidenced by the legislative history (pp. 38–41, *supra*), is the S. E. C.'s interpretation of the term "substantial economies" as economies of sufficient importance that their loss would cause a serious economic impairment of the system to be divested, so as to render it incapable of independent economical operation.[45]

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[45] We are aware of no decision of the S. E. C. inconsistent with its interpretation of "substantial economies" in this case. The S. E. C. applied the same test in *General Public Utilities Corporation*, 32 S. E. C. 807, 826–827; *Philadelphia Co.*, 28 S. E. C. 35, 46, 47, affirmed, 177 F. 2d 720 (C. A. D. C.); and *Federal Water and Gas Corp.*, 12 S. E. C. 766, 775, 777. Cf. *North American Company*, 11 S. E. C. 194, 209, affirmed, 133 F. 2d 148 (C. A. 2), affirmed, 327 U. S. 686.

As held in *Engineers Public Service Co.* v. *Securites and Exchange Commission,* 138 F. 2d 936, 944 (C. A. D. C.):

> "Substantial economies", means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. If the Act can be construed as meaning just that, then the severance ordered here is wrong. * * * But Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases.

In the *Engineers* case, it was also emphasized that, even though there might be a showing of "saving" in permitting a combined operation, it need not be assumed this "saving would constitute an overall substantial economy," when taking into consideration "so important an event as the freedom of a corporation from the ownership and control of another corporation engaged in a business to some extent intercompetitive * * *" (138 F. 2d at 944).[46] And in *Philadel-*

[46] The court below misread the *Engineers* case when it cited that opinion for the proposition that the question of the importance of the economies "must, of course, be determined by the bearing they have on the ability of the two systems to con-

phia Co. v. *Securities and Exchange Commission*, 177 F. 2d 720, the Court of Appeals for the District of Columbia Circuit reaffirmed its holding in the *Engineers* case that economies are not substantial unless their loss is of such magnitude as to make severance economically impossible. The court stated (177 F. 2d at 725):

> In the Commission's view, economies are not "substantial" unless their loss "would cause a serious economic impairment of the system" such as to "render it incapable of independent economical operation." * * * "Substantial" is a relative and elastic term. Petitioners concede that economies, to be substantial, must be "important". We cannot say that the Commission's understanding of the term "substantial economies" is wrong. We construed it similarly in the Engineers case.

Similarly, the inability "to operate economically under separate management" has been stated by this

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tinue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses" (R. 142). The language paraphrased from the *Engineers* opinion was used in that opinion in the context indicated in the text above. The court below used it, however, in a manner which failed to take into consideration the importance of "freedom" of the controlled additional system and the "intercompetitive" nature of the business.

Court in the *North American Co.* case as a criterion for retention (p. 43, *supra*).[47]

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[47] We note one final difficulty with the opinion of the court below. It is uncertain what import is to be given to the restriction that "the further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order" (R. 142). In its opinion in connection with its March 20, 1953 order, the S. E. C. stated that it did not "propose at this time to take any action with respect to the gas and transportation properties of New Orleans [Public Service, Inc.] under the standards of Section 11 (b) (1) of the Act" (R. 121). We think it wholly improper for the court below to indicate, as its opinion might be construed, that the S. E. C., in reopening the proceeding, would be precluded from considering this reserved problem, particularly in the light of Clause (C) of Section 11 (b) (1) of the Act, which provides that the S. E. C. cannot permit the retention of additional systems where the continued combination of all the systems under common control would be so large as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation. Since the S. E. C. found that the standards of Clause (A) had not been met, it never considered the application of Clause (C) with respect to Louisiana Power's gas properties. Any restriction on its right to consider the application of that clause with respect to the effect of the retention of the gas properties of both Louisiana Power and New Orleans upon the entire Middle South holding company system would be an undue interference with the task which Congress has entrusted in the first instance to the S. E. C.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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MARCH 1957.

APPENDIX

Section 11 (b) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79k (b), 49 Stat. 820):

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the

state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

* * * * *

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x (a), 49 Stat. 834):

Any person or party, aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by

the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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